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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1118

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

MARY JO DICKEN AND ELIZABETH M. DICKEN, B. M. MURRAY, EXECUTOR OF THE ESTATE OF EMMA GANG, DECEASED, AND JACOB E. SANDUSKY, SHERIFF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court has not yet been reported. The Circuit Court of Appeals did not render an opinion.

JURISDICTION

The judgment of the District Court was entered on March 26, 1946 (R. 33), and the order of the Circuit Court of Appeals denying an injunction pending appeal on April 5, 1946 (R. 46). The

petition for a writ of certiorari was filed in this Court on April 15, 1946. Certiorari was granted on April 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and, in the alternative, under Section 262 of the Judicial Code.

QUESTIONS PRESENTED

1. Whether Section 265 of the Judicial Code prohibits a District Court from issuing an injunction under Section 205 (a) of the Emergency Price Control Act to restrain eviction of a tenant pursuant to an order of a state court, although such eviction would violate that Act and the Rent Regulation for Housing issued thereunder.

2. Whether the Circuit Court of Appeals abused its discretion in refusing to issue an injunction to maintain the *status quo* pending appeal, particularly in view of its dismissal as moot of another and similar case after the tenant had been evicted subsequent to the denial of an injunction pending appeal.

STATUTES AND REGULATION INVOLVED

The statutes and regulation involved are Section 265 of the Judicial Code (28 U. S. C. 379), the Emergency Price Control Act of 1942, 56 Stat. 23, as amended (50 U. S. C. App., Supp. IV, Sec. 901, *et seq.*), and Rent Regulation for Housing, as amended (10 F. R. 3436, 13528) issued under the Act. Section 265 is set forth in the Appendix.

infra, p. 18. The pertinent provisions of the Price Control Act and of the regulation are set forth in the Appendix to petitioner's brief in *Porter* v. *Lee*, Nos. 1116, 1117.

STATEMENT

This case is brought here along with *Porter* v. *Lee*, Nos. 1116, 1117, which involves the same problem and which ties into the present case in a manner to be described.

Section 6 of the Rent Regulation for Housing provides that no tenant shall be removed or evicted (except on grounds none of which is or was present in this case) unless, on petition, the Administrator of the Office of Price Administration issues a certificate authorizing the eviction.[1] Violation of these regulations is forbidden by Section 4 (a), and Section 205 (a) empowers the Administrator to seek injunctive relief against such violations.

This is a suit for an injunction by the Administrator of the Office of Price Administration to restrain an eviction of a tenant in violation of this Regulation (R. 1–3). As appears from a stipulation as to the facts (R. 14–15), the tenant is in possession of a house located within the Columbus Defense Rental Area which was owned by the Estate of Emma Gang, deceased. The house was sold by her Executor, respondent B. M.

[1] The validity of this provision is not challenged, nor could it be attacked in this proceeding. *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503.

Murray, pursuant to authority granted by an order of the Probate Court of Franklin County, Ohio, which confirmed the sale and included a writ of possession. Murray thereupon "issued a precipe and a writ of possession was issued to the Sheriff of Franklin County, Ohio, by the Probate Court" directing respondent Jacob E. Sandusky as Sheriff of Franklin County to evict the tenant and to place the purchasers in possession (R. 14). The sheriff thereupon notified the tenant to vacate before January 22, 1946 (R. 14–15).

No certificate was applied for or obtained from the Administrator of the Office of Price Administration authorizing the eviction, as required by the Rent Regulation. While the writ was in the hands of the Sheriff for execution the Administrator brought this action against the owners, the executor and the Sheriff to restrain the eviction. On March 26, 1946, the District Court, after issuing a temporary injunction, dismissed the suit for injunction on the ground that Section 265 of the Judicial Code (28 U. S. C. 379) barred the relief sought (R. 33).

The District Court, however, entered an order restraining the defendants from evicting the tenant pending determination by the Circuit Court of Appeals of an application for an injunction prohibiting the eviction pending an appeal to that court. Notice of appeal was filed March 26, 1946, and on the same day an application for

an injunction to restrain eviction of the tenant pending the appeal was made to the Circuit Court of Appeals for the Sixth Circuit. This application was denied on April 5, 1946, thus removing all obstacles to the eviction of the tenant by the Sheriff. The Circuit Court of Appeals has not yet heard the case on the merits.

Three days later, on April 8, 1946, the same Circuit Court of Appeals dismissed, on the ground of mootness, appeals by the Administrator in *Porter* v. *Lee*, Nos. 1116, 1117, from similar denials by a District Court of injunctions to restrain eviction, where subsequent to the decision of the District Court the tenant had moved out of the premises under threat of forcible eviction. There too the District Court had denied the Administrator relief because of an asserted lack of jurisdiction, and the Circuit Court of Appeals had denied the Administrator a stay pending appeal from the first of the two orders there involved before the tenant was evicted.

In order to prevent the eviction of the tenant in this case, an application for an injunction restraining the eviction pending the final disposition of the case by this Court, was made to and granted by Mr. Justice Reed on April 10, 1946.*

*As this brief was about to be returned for final printing, we received respondents' motion to dissolve the injunction, which sets forth facts at variance with the information in our possession. It seems advisable to permit this brief to be printed without change, and to deal with those facts, after further investigation, in a reply to respondents' motion.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals for the Sixth Circuit erred in denying an injunction to restrain the eviction of the tenants pending its decision on the appeal from the District Court's decision.

2. The District Court erred in dismissing this action on the ground that Section 265 of the Judicial Code prohibited it from issuing an injunction under Section 205 (a) of the Emergency Price Control Act restraining the eviction of a tenant pursuant to an order of a state court, when such eviction would violate the Federal Act and the Rent Regulation for Housing issued thereunder.

SUMMARY OF ARGUMENT

I

The eviction which the Administrator sought to enjoin was a clear violation of the regulation. The Circuit Court of Appeals abused its discretion in refusing to stay the unlawful eviction pending appeal, because, without a stay, the tenant would have been evicted before the decision of the District Court could be reviewed. Even though the tenant might be reinstated later, the major harm would have been done and the objectives of the rent regulation frustrated. Moreover, under the ruling of the same court in *Porter* v. *Lee*, Nos. 1116 and 1117, the case would have become moot as soon as the tenant was dis-

possessed, thus making review by the Circuit Court of Appeals of the District Court's decision impossible, and allowing the landlord to achieve his unlawful purpose.

II

Section 265 of the Judicial Code did not bar the issuance of an injunction by the District Court. The Administrator, through the issuance of the rent regulations which prohibited evictions under the circumstances presented by this case, exercised the power which he was given to regulate or prohibit "practices relating to recovery of the possession" (§ 2 (d)). Section 205 (a) of the Emergency Price Control Act authorizes the Administrator to apply for injunctive relief against acts or practices in violation of the Act. And in *Bowles* v. *Willingham*, 321 U. S. 503, this Court held that Section 205 (a) is a statutory exception to Section 265 of the Judicial Code. Similarly three Circuit Courts of Appeals and numerous district courts have upheld the Administrator's right to obtain injunctive relief against unlawful state court eviction proceedings despite Section 265. A contrary result would have gravely impaired the power of the Administrator to enforce the rent regulations. Section 265 of the Judicial Code has not been held a bar to enforcement by the Government of federal statutes in the federal courts.

ARGUMENT

I

The court erred in refusing to enjoin the eviction pending appeal

The attempted eviction here was plainly a violation of the regulation and the Circuit Court of Appeals clearly abused its discretion in refusing to stay the eviction pending appeal. In the absence of such a stay the tenant would have been compelled to vacate the premises before the decision of the District Court could be reviewed.

The major harm in an eviction proceeding is done when the tenant is dispossessed from the premises. In the acute housing shortage that now exists it is extremely difficult, if not impossible, for a tenant to find new quarters, and hardship inevitably ensues. The power of this Court ultimately to order reinstatement in vacated premises months later obviously does not fully safeguard tenants, inasmuch as the original removal causes the most serious injury whether or not a subsequent offer of reinstatement is required. Moreover, since premises do not today remain vacant long, even an offer of reinstatement raises the additional complication that the present occupant of the premises may have to be evicted. Clearly the harm to a tenant forced to move during the pendency of the appeal is very great. The harm resulting to the landlord from maintaining the *status quo* would ordinarily be nowhere near as

great; neither in this case nor in the *Lee* cases is there any proof of harm to the owner at all. From the broader viewpoint of law enforcement policy, it is vital that in a suit to prevent a violation of law, the violator should not be permitted to achieve his illegal end while the suit is still pending.

And if it is proper for a court, in passing upon an application for temporary relief pending appeal, to give weight to the likelihood that the judgment appealed from will be reversed, the District Court's decision that it lacked jurisdiction is, as we shall show, in conflict with the decision of this Court in *Bowles* v. *Willingham*, 321 U. S. 503, as well as the decisions of three other Circuit Courts of Appeals.

Furthermore, a denial of an injunction pending appeal, would, under the ruling in the *Lee* cases have made it impossible to obtain a review of the judgment of the District Court in the Circuit Court of Appeals. Normally the very fact that a case may otherwise become moot pending appeal requires the granting of a stay. *Jamnsen* v. *Belding-Corticelli*, 79 F. 2d 828 (C. C. A. 3).

On any balancing of interests or convenience, the *status quo* clearly should have been preserved pending appeal. *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1; *Ohio Oil Co.* v. *Conway*, 279 U. S. 813; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210. In the absence

of any possible reason for denying the Administrator temporary relief, the action of the court below in this respect was clearly an abuse of discretion, which is aggravated by the decision that the eviction pending appeal renders the case moot.

This Court on certiorari may review the interlocutory as well as the final orders of the Circuit Court of Appeals. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258; *Panama R. R. Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 284. In view of the number of instances in which the present problem may arise, particularly in the light of the existing housing shortage, it is respectfully submitted that the Court should review the Circuit Court of Appeals' action in denying the stay.

II

The District Court erred in holding that Section 265 of the Judicial Code barred it from granting relief

The holding of the District Court that Section 265 of the Judicial Code barred it from enjoining an eviction is clearly wrong. In *Bowles* v. *Willingham*, 321 U. S. 503, this Court specifically held that the Emergency Price Control Act creates an express statutory exception to Section 265.

Section 205 (a) of the Emergency Price Control Act gives the Administrator authority to

seek injunctive relief against acts or practices in violation of Section 4, which in turn makes it unlawful to do any acts in violation of any regulation issued under Section 2. In issuing the regulations which prohibit evictions in state courts unless a certificate of eviction is secured (with exceptions not here pertinent), the Administrator exercised the power expressly conferred by Congress in Section 2 (d) to "regulate or prohibit * * * renting or leasing practices (including practices relating to recovery of the possession) * * *." An unlawful attempt to evict through the use of state court proceedings is as much a violation of the Act as the receipt of excessive rent, and the federal court on the application of the Administrator has the power to enjoin such violations under Section 205 (a). Thus, as this Court stated in the *Willingham* case, the Act specifically adds an exception to Section 265 of the Judicial Code in addition to those listed in *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, which recognized certain "subsequent statutes" as implied legislative amendments to or qualifications of Section 265. As in the case of the other statutory exceptions, Congress here authorized injunctions to stay proceedings in state courts in order to make federal legislation effective. In the *Willingham* case, this Court said (pp. 510–511):

> We are met at the outset with the question whether the District Court could in

any event give the relief which the Administrator seeks in view of § 265 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 379) which provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." We recently had occasion to consider the history of § 265 and the exceptions which have been engrafted on it. *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118. In that case we listed the few Acts of Congress passed since its first enactment in 1793 which operate as implied legislative amendments to it. 314 U. S. pp. 132–134. *There should now be added to that list the exception created by the Emergency Price Control Act of 1942. By § 205 (a) the Administrator is given authority to seek injunctive relief in the appropriate court (including the federal district courts) against acts or practices in violation of § 4, e. g., the receipt of rent in violation of any regulation or order under § 2.* Moreover, by § 201 (d) of the Act one who seeks to restrain or set aside any order of the Administrator or any provision of the Act is confined to the judicial review granted to the Emergency Court of Appeals, which was created by § 204 (e) and to this Court. As we recently held in *Lockerty* v. *Phillips*, 319 U. S. 182, 186, 187, Congress confined jurisdiction to grant equitable relief to that

> narrow channel and withheld such jurisdiction from every other federal and state court. Congress thus preempted jurisdiction in favor of the Emergency Court to the exclusion of state courts. The rule expressed in section 265 which is designed to avoid collisions between state and federal authorities (*Toucey* v. *New York Life Ins. Co., supra*) thus does not come into play. The powers of the District Court under Section 205 (a) of the Act and Section 24 (1) of the Judicial Code are ample authority for that court to protect the exclusive federal jurisdiction which Congress created. [Italics supplied.]

In addition three Circuit Courts of Appeals have held that Section 265 is not a bar where the Administrator brought injunction proceedings to restrain landlords from further prosecuting eviction suits in state courts. *Henderson* v. *Fleckinger*, 136 F. 2d 381 (C. C. A. 5); *Brown* v. *Wright*; 137 F. 2d 484 (C. C. A. 4); *Bowles* v. *Hayes* (C. C. A. 3), decided April 17, 1946, not yet reported. In many other instances the District Courts have granted injunctions to restrain proceedings in state courts.[2]

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[2] *Henderson* v. *Kimmel*, 47 F. Supp. 635 (D. Kans.); *Brown* v. *Wick*, 48 F. Supp. 887 (E. D. Mich.); *Brown* v. *Wood*, 59 F. Supp. 872 (N. D. Cal.); *Bowles* v. *Rocks*, 60 F. Supp. 653 (W. D. Pa.); *Bowles* v. *Hall*, 63 F. Supp. 826 (W. D. Pa.); *Bowles* v. *Fontanello*, 3 OPA Op. & Dec. 5119 (W. D. Pa., 1945); *Brown* v. *Wilson*, 1 OPA Op. & Dec. 1791 (W. D. Wash. 1943).

The District Court acknowledged that its decision was in conflict with the *Fleckinger* and *Wright* decisions, but contended that it was not bound by them. It sought to distinguish the *Willingham* case on the ground that it applied only where a state court was attempting to enjoin the Administrator from acting, and ruled that since 205 (c) of the Act gave "concurrent" jurisdiction to state courts,[2] Section 265 required it to hold that the federal court was not an "appropriate" court in which to institute this proceeding and barred it from granting relief. The *Willingham* case itself places no such limit on the power of the federal court, and there is nothing in the Act to indicate that the exception to Section 265 is so limited. The District Court's endeavor to distinguish the *Willingham* decision on the ground that it involved a case where the state court was deprived of jurisdiction of the proceedings sought to be enjoined, and where therefore there was no room within which Section 265 of the Judicial Code could operate, overlooks the fact that this was only one of the bases for the decision in the *Willingham* case. The other ground was that Section 205 (a) of the Emergency Price Control Act constitutes a statutory exception to Section

[2] The question of concurrent jurisdiction is discussed in the brief for petitioners in *Porter* v. *Lee*, Nos. 1116, 1117, at pp. 19-28.

265. The fact that the Administrator could also, if he chose, have proceeded in a state court, does not deprive him of his statutory right to resort to the federal court, nor does that fact distinguish the *Willingham* case, since there too the Administrator might have proceeded in a state court.

The power of the Federal Government to secure compliance with its own laws through the federal courts despite Section 265 has often been recognized in connection with other statutes. *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757 (C. C. A. 9); *Western Fruit Growers, Inc.* v. *United States*, 124 F. 2d 381 (C. C. A. 9); *In re Standard Power & Light Corp.*, 48 F. Supp. 716 (D. Del.).

The Court is respectfully referred to our brief in *Porter* v. *Lee*, Nos. 1116, 1117, submitted herewith, pp. 23–28, for the argument that effective enforcement of the Rent Regulations requires that the Administrator retain his right to obtain injunctions in the federal court to restrain unlawful evictions.

Respondent suggests that, because the property was sold by order of the Probate Court, this in some unexplained way prevents the issuance of an injunction against the eviction. The Administrator has never sought to regulate prices in sales of real estate, whether judicial or otherwise. In this case the Regulation does not in any way con-

trol the sales price of the property, but affects only the attempt by the owner to evict a tenant. For purposes of the Rent Regulation it is immaterial whether ownership of property was transferred by judicial sale or in any other manner, or whether the owner is an executor or a purchaser at such a sale. Regardless of how or when ownership of a house is acquired, the regulation (with exceptions not here pertinent) still prohibits evictions unless the proper eviction certificate is obtained.[4]

The fact that a state Probate Court may have ordered an eviction is, of course, no defense when the Federal law is to the contrary. *Case* v. *Bowles*, No. 261, *Hulbert* v. *Twin Falls County*, No. 238, both decided February 4, 1946.

CONCLUSION

For the foregoing reasons the order of the court below and the judgment of the District Court

[4] The regulations set forth in the appendix to the Government's brief in *Porter* v. *Lee*, Nos. 1116, 1117, state the requirements for obtaining a certificate. For example, a purchaser of a house who wishes to live in it himself and who has paid 20% of the purchase price may secure a certificate authorizing him to pursue his remedies under local law for eviction of the tenant at the end of periods normally ranging between three and six months from the date of filing the application for a certificate. The regulations further provide that where the Administrator makes certain findings a certificate may be obtained without fulfilling these requirements.

should be reversed. Inasmuch as there is no dispute as to respondents' failure to comply with the Regulation, and hence nothing to try, the District Court should be instructed to grant the injunction.

Respectfully submitted.

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MAY 1946.

APPENDIX

Section 265 of the Judicial Code (36 Stat. 1162, 28 U. S. C. Section 379) reads as follows:

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.